IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 42

GUY A. THOMPSON, TRUSTEE,
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR, AND
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, *Petitioners*,

v.

THE TEXAS MEXICAN RAILWAY COMPANY, *Respondent*

PETITIONERS' REPLY BRIEF

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For the sake of brevity this reply will be couched in memorandum form and will follow the headings in Respondent's brief. Simple page references are to that brief.

Statement of the Case

The letter referred to as support for the statement made

in Paragraph 1 (p. 1) was not admitted in evidence but was expressly excluded (R. 159-162).[1]

If the trial court lacked jurisdiction over the subject matter, as Petitioners contend, the delay mentioned in Paragraph 2 (p. 1) was immaterial.

Counter-Point One

In the first sentence under this heading (p. 2) mention might have been made of the Commission's jurisdiction with regard to abandonment as well as extension of lines, under trackage contracts.

Reference is made (p. 2) to the amendment of Section 5 by the Transportation Act of 1940. Paragraph (1) of Section 5, like many other paragraphs of the Act, begins with or contains the words "it shall be *unlawful*." Paragraph (2) begins "It shall be *lawful*, with the approval and authorization of the Commission * * *." Paragraph (4) begins with this statement: "It shall be unlawful for any person, except as provided in Paragraph (2), to enter into any transaction within the scope of Subparagraph (a) thereof * * *." In Paragraph (11) it is stated that "The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction and approved by the Commission thereunder shall have

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[1] Other departures from the record include: Note 2 on p. 4, the statement (p. 12) that Petitioner "began moving traffic into Corpus Christi over the lines of * * * San Antonio, Uvalde & Gulf Railroad Company;" the statement (p. 12) that "the compensation (which we distinguish from reimbursement of expense) paid to Respondent * * * was fixed on a wheelage basis" (see R. 139); the irrelevant claim (p. 13) that Respondent had "small assets" and makes "contributions" to Petitioners; the imaginative suggestion, without foundation in fact (Note 5, p. 20), that Petitioner Trustee may have made a secret and unsuccessful application for injunction to the Court of Bankruptcy.

full power * * * to carry such transaction into effect * * *."
Paragraph (18) of Section 1 was amended by the same Act (54 Stat. 902) but only by adding the following sentence—"Nothing in this paragraph or in Section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side-tracks."

The 1940 amendments, therefore, did not restrict or affect any power of the Commission under Section 1(18) respecting abandonments; nor did the 1940 amendment of Section 5 authorize a carrier even with the approval of the Commission, to *give up* or *be divested of* trackage rights. Apparently, all questions growing out of abandonments, actual or proposed, must be determined under Section 1(18). In view of Section 5(4), as amended in 1940, we are by no means certain that Section 5(2) "has no bearing on the present situation" as claimed by Respondent (p. 2). It is not inconceivable that by insisting upon a money judgment against Petitioners in the present case, fixing for a specific time its compensation for the joint use of a part of its railroad line by Petitioners, Respondent may have violated the quoted part of Section 5(4).

Mention is made (p. 3) of "the grave constitutional question" which would be raised by the construction of the Act contended for by Petitioners; but we are not told what the question is; nor are we told, with cited authorities, what is the "uniform practice of the Commission" mentioned in the same connection.

A refusal by the Commission to approve long-term trackage contracts without provisions for termination on notice (p. 3) is understandable. Reading into such a provision the requirement of Section 1(18) of the Act that operations by the user may not be abandoned without a certificate

from the Commission, the Commission is reasonably assured by such a provision that it will have an opportunity to review the propriety of the arrangement in case conditions should change materially. In the event of such a change, the party injured can probably be depended upon to give notice of termination and thus by application for a certificate, bring the matter to the Commission's attention. The inconsistency asserted by the Respondent (p. 3) is not apparent to us, nor do we contend, as asserted (p. 3) that "the Commission has exclusive authority to fix compensation," nor that "such a contract can be terminated only in abandonment proceedings."

We do contend that jurisdiction to determine the fair rental or compensation for the use by one interstate carrier of a line of railway owned and used by another interstate carrier is vested exclusively in the Interstate Commerce Commission. We do not contend that the Commission has any power to make a contract between such parties, but the amount of rental is clearly within the Commission's jurisdiction since it may attach or impose any conditions it desires upon the issuance of a certificate of public convenience and necessity, including a condition that the rental shall not exceed or shall not be less than the amount which the Commission determines to be fair to both parties and to the public.

From what is said later (pp. 13-14) it is apparent that counsel for Respondent understand our real contention. For instance they say "* * * the Commission may refuse to grant authority except on condition that the parties revise their agreement in accordance with the Commission's views. The parties are then free either to abandon the proposed contract and operations entirely or to revise their contract to meet the Commission's contentions. In neither case can it properly be said that the Commission fixes the compensa-

tion. The Commission does no more than present the parties with a choice, and the choice they make is their own voluntary action." In the present case if Respondent, about the time of serving its notice of termination, had applied to the Commission for a certificate, authorizing Petitioners to abandon their operations over Respondent's line, the Commission, if it had deemed the rental inadequate, could have granted the certificate upon condition that it should not be issued if, within a specified time, Petitioners should file with the Commission their written agreement to pay an additional rental at least equal to the minimum regarded by the Commission as fair. No reason appears why we should assume that the Commission on the merits would not grant an application for abandonment if the rental was, in fact, inadequate.

We do not "ignore" the distinction "between the termination of a contract and the termination of operations" (p. 5). We argue that in the circumstances presented by this Record the contract of 1904 could not be and has not been terminated, because no certificate of abandonment has been issued by the Commission under Section 1(18) and, therefore, the rights of entry and operation conferred on the Petitioners by the contract are still in existence.

It will be noted that although the Transportation Act, 1920, has been on the books for more than a quarter century and has been discussed in scores of decisions by this Court, Respondent, to support its contention about the proper construction of Section 1(18), or in refutation of Petitioners' contentions (pp. 2-17), cites practically no decisions except those of the Interstate Commerce Commission and the lower Federal courts.

Counter-Point Two

Respondent says we are "unable to point to any specific authority in the statutes" for our contention (p. 15).

Neither could the plaintiff in error in TEXAS & PACIFIC RY. CO. v. ABILENE COTTON OIL COMPANY, 204 U.S. 426. Examination of decisions of this Court construing the Interstate Commerce Act will reveal that many firmly settled conclusions depend on inference rather than on specific provisions of the statute.

Complaint is made that Petitioners "suggest no procedure whatever" to be followed by Respondent (p. 15), and that Petitioners "are interested only in perpetuating as long as possible the excessively favorable terms of the contract" (p. 16). If Respondent had been diligent in resorting to the Commission (as Petitioners long ago suggested) for a certificate of public convenience and necessity under Section 1 (18), it might long ago have secured relief. In any event, it would not, at this late date, be in doubt about whether it has a sufficient interest in the subject matter to prosecute an application for such a certificate, and it might, with better grace, claim that Petitioners are trying to prolong unduly the life of the contract.

As to the recognition extended by Congress (p. 16) to the competence of courts and juries "to pass upon the proper compensation to be paid by one railroad for the use and facilities of another" see the INTERSTATE COMMERCE ACT, Sec. 5(2), previously cited by Respondent (p. 2).

Counter-Point Three

Respondent (p. 17) challenges Petitioners' statement (Brief, p. 12) that this suit had for one of its purposes the cancellation of the contract. In this, Respondent is technically correct and we accept the correction. It would have been more accurate if we had said, as we did on p. 10, that the relief sought required a judicial determination that Respondent had cancelled or terminated the contract; that such

termination was valid and effective and that, bottomed thereon, Respondent was entitled to recover.

Respondent claims (pp. 17-18) that the main purpose of its suit was merely to secure money damages, and that the granting of the injunction would not have interfered with any property in possession of the Trustee. The property need not be in the technical possession of the debtor, the Trustee, or the Court of Bankruptcy. It is sufficient if it is *under the control* of the Trustee. As was said in MURPHY V. JOHN HOFFMAN COMPANY, 211 U.S. 562, 569, "The Court having possession of the property has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or *control* of the property." Irrespective of any question of technical *title* the Bankruptcy Court certainly had control of operations on and a large measure of possession of the property. The Petitioners' employees went upon it daily in the operation of their trains (R. 9-10, 12, Par. 2-4), and Respondent's first prayer for relief was for an injunction to put a stop to such operations (R. 46).

Respondent suggests (p. 18) that the trial court may have taken the plea to jurisdiction "along with the case on its merits," and "for aught that appears in the record" the "court's denial of injunctive relief may as well have been based on its own finding of want of jurisdiction as upon the merits." However, the Record (p. 103) shows that the motion to stay and the plea to the jurisdiction were separately heard, before the selection of the jury for the trial. The Record also shows:

> "Testimony closed on motion to stay and plea to jurisdiction * * *
>
> "The Court: Gentlemen, I am going to overrule the motion to stay and plea of jurisdiction, and we will go to trial in the morning at 9:30 o'clock" (R. 86).

On August 26, 1943, the Court overruled the motion to stay and the plea to the jurisdiction of the trial court (R. 69). The charge of the Court and the verdict of the jury are dated the following day (R. 78). The trial court plainly ruled that it did have jurisdiction, and its denial (R. 85, 91) of Respondent's prayer for injunction (R. 46) was an adjudication of that issue on the merits.

The matter of jurisdiction over subject matter may be raised at any time without regard to due order of pleading. The nature of the case pleaded by Respondent determined this matter of jurisdiction. EX PARTE BALDWIN, 291 U.S. 610. The relief ultimately given or denied cannot change the nature of the case pleaded. Neither the trial court (R. 69) nor the Court of Civil Appeals (R. 189-198) thought the motion or plea was filed too late.

Respondent states broadly (p. 20) that this Court in MCNULTA V. LOCHRIDGE, 141 U.S. 327, interpreted Section 66 of the JUDICIAL CODE to confer an unlimited right to sue in the state courts with respect to the Trustee's "contracts, misfeasances, negligences and liabilities." The case must be interpreted in the light of the questions involved. It was a suit to recover against a receiver of a railroad for an ordinary crossing accident which occurred during the tenure of a prior receiver appointed in the same proceeding. No one questioned the general right of the plaintiff to sue in the state court. The sole question was whether the receiver actually sued was liable to suit under Section 66 for an accident occurring during his predecessor's term of office. The broad statements made in that early case have been limited by later decisions such as MURPHY V. JOHN HOFFMAN COMPANY, supra, ISAACS V. HOBBS TIE & TIMBER COMPANY, 282 U.S. 734; CONTINENTAL BANK & TRUST COMPANY V. CHICAGO R. I. & P. RY. COMPANY, 294 U.S. 648; EX PARTE

BALDWIN, 291 U.S. 610; and WARREN v. PALMER, 310 U.S. 132.

Respondent labors greatly (pp. 19-30) to make out its right to sue under Section 66 of the JUDICIAL CODE (Title 28 U.S.C., Sec. 125). In addition to what we said on this subject in our Brief (pp. 14-16), it may be suggested that no matter how many acts or transactions a Federal receiver or trustee may engage in with or in respect of property of the bankrupt or debtor, no suit, consistently with the decisions last above cited, can be brought against him, except in or by the leave of the court which appointed him, if the effect thereof is to challenge his title or right to possess or control the property entrusted to him by the court, or to interfere with an orderly reorganization under Sec. 77 of the BANKRUPTCY ACT.

Respondent cites BENNETTE v. LEWIS, 176 S.W. 660. If the evidence had there shown, as it did not, that previous to the bankruptcy the party claiming the timber had been going daily upon the land and cutting a portion of the timber growing thereon (as here, the Trustee's train crews were going daily upon Respondent's tracks in the use of the property and in furtherance of the business committed to the Trustee by the Court which appointed him), the Court would probably not have held that the Trustee was not in possession of the property.

Respondent claims (p. 27) that the present suit was as much one for damages growing out of the operation of the Trustee's trains "as if one of Petitioners' locomotives had negligently set fire to some portion of Respondent's right-of-way. The kind of claim is the same whether the damage be accomplished quickly by means of fire, or more slowly by means of the pounding of Respondent's roadbed * * *." Respondent sought to recover "the reasonable value of the

use" of the property (R. 45-47). The charge of the Court (R. 76-78) did not require the jury to find the damage resulting from the pounding of the roadbed but "the reasonable value per day of the use by the defendant * * * to (of) the railroad tracks and facilities belonging to plaintiff."

Respondent complains of the hardship that may result if it is not permitted to sue in the State court but is required, instead, to resort to the Court of Bankruptcy. Whether hardship results or not, the decisions of this Court, heretofore cited by Petitioners (Brief, pp. 7-13) consistently hold that only the Court of Bankruptcy has jurisdiction to try the title to property in the custody of that Court, or to entertain an action which seeks to enjoin the Trustee from conducting his operations as Trustee.

Respondent asserts (p. 26) that Petitioners' rights have been affected by waiver, due to the alleged delay in filing the motion to dismiss and the plea to the jurisdiction. In no event can any doctrine of waiver be carried beyond the proposition that while the debtor may have waived its right to enforce the stay order entered in its favor (which is not admitted to be the case here), no amount of waiver by the Trustee, as held in PALMER V. LARCHMONT MANOR CO., 30 N.E. (2d) 599, 284 N.Y. 288, could confer jurisdiction on any court, except the one from which he drew his appointment, to try the title to property committed to his possession or to enjoin him from conducting his operations as Trustee.

Respondent asserts that it "is in undisputed possession of" the property covered by the contract of 1904, and its "title and possession is clear" (p. 29). One of the reasons why the State courts had no jurisdiction is the claim of Petitioners, supported by evidence above referred to, that Respondent's title is encumbered by the rights which it granted by the trackage contract and that its possession is not and has not been exclusive but joint with the several Petitioners.

The desperation of Respondent's counsel is shown by the statement (p. 30) that "Respondent cannot *lawfully* prevent Petitioners' *invasion* of its property." Since when has it been impossible in this country for the courts to prevent, and lawfully, an invasion of and trespass on property? Only since Respondent's counsel invented the novel conception of a trespasser who is forbidden on pain of felony to leave the property trespassed upon.

Respectfully submitted,

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